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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

IN RE CONAGRA FOODS, INC.

Case No. CV 11-05379-MMM  
(AGRx)MDL NO. 2291

CLASS ACTION

**PUBLIC REDACTED VERSION OF  
PLAINTIFFS' MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT OF THEIR MOTION  
FOR CLASS CERTIFICATION**

DATE: July 14, 2014  
TIME: 10:00 a.m.  
CTRM.: 780  
JUDGE: Hon. Margaret M. Morrow

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## I. INTRODUCTION

Defendant ConAgra Foods, Inc. (“Defendant” or “ConAgra”) sells millions of containers of Wesson Canola Oil, Wesson Corn Oil, Wesson Vegetable Oil, and Wesson Best Blend (collectively, “Wesson Oils” or the “Products”) to consumers throughout the United States every year. On the front label of every one of these millions of containers, ConAgra prominently represents that its Wesson Oils are “100% Natural.” Wesson Oils, however, are not “100% Natural”; rather, they are made from corn, soy, and canola seeds that come from plants whose DNA has been deliberately altered by the forced introduction of DNA from other species so that the plants will express specific traits they do not possess in nature or through traditional cross-breeding methods, such as resistance to certain herbicides and pesticides. These plants are commonly referred to as “genetically modified organisms,” or “GMOs.” Simply put, Wesson Oils are not “100% Natural” because they are made from or contain GMOs.

Robert Briseño, Michele Andrade, Jill Crouch, Julie Palmer, Pauline Michael, Cheri Shafstall, Dee Hopper-Kercheval, Phyllis Scarpelli, Kelly McFadden, Necla Musat, Maureen Towey, Erika Heins, Rona Johnston, and Anita Willman (“Plaintiffs”) are each ordinary consumers, living in twelve different states, who purchased Wesson Oils between January 2007 and their entry into this case. Each of these Plaintiffs saw the phrase “100% Natural” printed on the label of the Wesson Oil(s) that they purchased and based their purchasing decision, at least in part, on the veracity of that “100% Natural” phrase.

Plaintiffs allege that ConAgra’s claim that Wesson Oils made from GMOs are “100% Natural” is false, unfair, deceptive, and/or misleading. Plaintiffs assert causes of action under the statutory and common laws of the states in which they respectively reside (the “Class States”) on behalf of themselves and the other residents of those states who purchased the Products during the Class Periods (as

1 defined in Section III, below). Plaintiffs seek certification of twelve separate  
2 statewide classes (the “Classes”) of similarly situated purchasers of Wesson Oil(s)  
3 within each of those states (collectively, the “Class Members”) under (i) Fed. R.  
4 Civ. P. 23(b)(3) for damages and other relief, and (ii) Fed. R. Civ. P. 23(b)(2) for  
5 injunctive and declaratory relief to end ConAgra’s deceptive and misleading  
6 marketing. Plaintiffs also alternatively seek certification of the Classes under Fed.  
7 R. Civ. P. 23(c)(4) on the issue of whether ConAgra’s use of the term “100%  
8 Natural” is false, unfair, deceptive, and/or misleading.

9       The dispute between the parties over whether ConAgra’s “100% Natural”  
10 claim on the labels of Wesson Oils made from GMOs is false, unfair, deceptive,  
11 and/or misleading is the key question underlying each and every one of the claims  
12 asserted by the Plaintiffs in this proposed class action. The common and single  
13 answer to this question will drive the resolution of this case. Put another way, this  
14 question predominates over all others in this litigation.

15       Resolution of this question does not require analysis of individualized  
16 evidence, such as purchasing behavior, subjective opinions, or each Class  
17 Member’s individual experiences. Rather, the resolution will be based entirely on  
18 class-wide evidence because, under each of the legal claims asserted, the falsity,  
19 unfairness, deceptiveness, and/or misleading nature of ConAgra’s “100% Natural”  
20 claim, and the capacity of that claim to deceive or mislead a “reasonable  
21 consumer,” is an objective question susceptible to objective proof—regardless of  
22 variations in the beliefs, motivations, and knowledge of different individuals in  
23 different circumstances who purchased Wesson Oils at retail. *See, e.g., Guido v.*  
24 *L’Oreal, USA, Inc.*, 284 F.R.D. 468, 481-83 (C.D. Cal. 2012); *Oswego Laborers’*  
25 *Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 26 (1995).<sup>1</sup>  
26 Either Wesson Oils are fairly labeled as “100% Natural” despite being made from

27 <sup>1</sup> *See also* Plaintiffs’ Appendix 1: Predominant Questions Susceptible to Class-  
28 Wide Proof for Each State Law Claim Asserted.

1 GMO ingredients, as ConAgra contends, or they are not fairly labeled as “100%  
 2 Natural” because of their derivation from GMO ingredients, as Plaintiffs allege.  
 3 Similarly, Plaintiffs offer two methods of proving damages on a class-wide basis  
 4 without the need for individualized inquiries, both of which are widely recognized  
 5 and accepted and supported by expert testimony. Thus, Rule 23(b)(3)’s  
 6 “predominance” requirement, which would appear to be the primary battleground  
 7 here, is readily satisfied.

8 The other applicable Rule 23(a) prerequisites (numerosity, commonality,  
 9 typicality, and adequacy), the judicially-created “ascertainability” doctrine, the  
 10 additional Rule 23(b)(3) requirements (superiority and manageability), and the  
 11 prerequisites for injunctive and declaratory relief for Rule 23(b)(2) certification are  
 12 also satisfied in this case, as more fully demonstrated below. Accordingly,  
 13 Plaintiffs respectfully request that the Court grant Plaintiffs’ motion for class  
 14 certification, certify the proposed Classes, designate Plaintiffs as class  
 15 representatives of the separate statewide classes they respectively seek to represent,  
 16 appoint Plaintiffs’ Interim Co-Lead Counsel as Class Counsel, and direct ConAgra  
 17 to issue notice to the Classes in a form to be determined.<sup>2</sup>

## 18 II. SUMMARY OF FACTS

### 19 A. ConAgra Made the Challenged “100% Natural” Claim on the 20 Label of Every Bottle of Wesson Oil Sold Throughout the Class Period to Boost Demand for Wesson Oils

21 ConAgra admits that throughout the Class Period, each and every bottle of  
 22 Wesson Oil claimed on its front label that its product was “100% Natural.”<sup>3</sup>

23 \_\_\_\_\_  
 24 <sup>2</sup> Alternatively, Plaintiffs request certification of these proposed classes under Fed.  
 R. Civ. P. 23(c)(4), as fully discussed *infra* at Sec. IV(F).

25 <sup>3</sup> Defendant ConAgra Foods, Inc.’s Answer to Second Consolidated Amended  
 26 Class Action Complaint, dated Jan. 16, 2013 (Dkt. 145) (“Answer”), ¶¶ 2, 11-31,  
 27 33; Declaration of Henry J. Kelston in Support of Plaintiffs’ Motion for Class  
 28 Certification, submitted herewith (“Kelston Decl.”), Ex. 4, Deposition of Raquelle  
 Hunter Pursuant to Rule 30(b)(6) (Apr. 29, 2014) (“Hunter Dep.”) at 65:5-6 (“100  
 percent natural ... has been on our product since well before 2007”).

1 Specifically, at least as far back as June 25, 2005 (prior to the Class Period),  
2 ConAgra claimed on the front label of Wesson Oils, directly below the brand  
3 name, that they were “100% Natural.”<sup>4</sup> The decision to make a particular claim on  
4 the front of a package is not one that consumer goods manufacturers make lightly,  
5 and ConAgra is no exception. By placing the “100% Natural” claim on the front  
6 of all of its Wesson Oils, ConAgra demonstrates its belief, [REDACTED]  
7 [REDACTED], that a “natural” claim on food products is important to consumers in  
8 general, and that the “100% Natural” statement on Wesson Oils labels specifically  
9 motivates consumers to purchase the Products.

10 Consumer demand for “natural” products has skyrocketed in recent years.<sup>5</sup>  
11 At the same time, consumers’ interest in, and concerns about, GMOs have also  
12 increased dramatically.<sup>6</sup> Reflecting consumer concerns, some major retailers such  
13 as BJ’s, have imposed their own guidelines banning GMOs in foods labeled as  
14  
15

16 <sup>4</sup> See, e.g., Kelston Decl., Ex. 1, CAG0001414, CAG0001429, CAG0001431,  
17 CAG0001436 (proofs of labels for 48oz Wesson vegetable, corn, canola, and best  
blend oil dated between July 25, 2005 and August 10, 2005).

18 <sup>5</sup> According to Nielsen, food labeled as “natural” generated \$22.3 billion in sales in  
19 2008, up 10% from 2007, and up 37% from 2004. See “Natural” Beats  
20 “Organic” in Food Sales According to Nielsen’s Healthy Eating Report (Jan. 21,  
2009),  
21 [http://www.nielsen.com/us/en/newswire/2009/%C3%A2%C2%80%C2%9Cnatural](http://www.nielsen.com/us/en/newswire/2009/%C3%A2%C2%80%C2%9Cnatural%C3%A2%C2%80%C2%9D-beats-%C3%A2%C2%80%C2%9Corganic%C3%A2%C2%80%C2%9D-in-food-sales-according-to-nielsen%C3%A2%C2%80%C2%99s-healthy-eating-report.html)  
22 [http://www.nielsen.com/us/en/newswire/2009/%C3%A2%C2%80%C2%9D-beats-](http://www.nielsen.com/us/en/newswire/2009/%C3%A2%C2%80%C2%9D-beats-%C3%A2%C2%80%C2%9Corganic%C3%A2%C2%80%C2%9D-in-food-sales-according-to-nielsen%C3%A2%C2%80%C2%99s-healthy-eating-report.html)  
23 [http://www.nielsen.com/us/en/newswire/2009/%C3%A2%C2%80%C2%9D-beats-](http://www.nielsen.com/us/en/newswire/2009/%C3%A2%C2%80%C2%9D-beats-%C3%A2%C2%80%C2%9Corganic%C3%A2%C2%80%C2%9D-in-food-sales-according-to-nielsen%C3%A2%C2%80%C2%99s-healthy-eating-report.html)  
24 [http://www.nielsen.com/us/en/newswire/2009/%C3%A2%C2%80%C2%9D-beats-](http://www.nielsen.com/us/en/newswire/2009/%C3%A2%C2%80%C2%9D-beats-%C3%A2%C2%80%C2%9Corganic%C3%A2%C2%80%C2%9D-in-food-sales-according-to-nielsen%C3%A2%C2%80%C2%99s-healthy-eating-report.html)  
25 [http://www.nielsen.com/us/en/newswire/2009/%C3%A2%C2%80%C2%9D-beats-](http://www.nielsen.com/us/en/newswire/2009/%C3%A2%C2%80%C2%9D-beats-%C3%A2%C2%80%C2%9Corganic%C3%A2%C2%80%C2%9D-in-food-sales-according-to-nielsen%C3%A2%C2%80%C2%99s-healthy-eating-report.html)  
26 [http://www.nielsen.com/us/en/newswire/2009/%C3%A2%C2%80%C2%9D-beats-](http://www.nielsen.com/us/en/newswire/2009/%C3%A2%C2%80%C2%9D-beats-%C3%A2%C2%80%C2%9Corganic%C3%A2%C2%80%C2%9D-in-food-sales-according-to-nielsen%C3%A2%C2%80%C2%99s-healthy-eating-report.html) (last  
visited May 2, 2014).

23 <sup>6</sup> The New York Times reported in 2013 that “[t]hree-quarters of Americans  
24 expressed concern about genetically modified organisms in their food, with most  
25 of them worried about the effects on people’s health.” Allison Kopicki, *Strong*  
26 *Support for Labeling Modified Foods*, N.Y. TIMES, July 27, 2013, available at  
[http://www.nytimes.com/2013/07/28/science/strong-support-for-labeling-](http://www.nytimes.com/2013/07/28/science/strong-support-for-labeling-modified-foods.html)  
modified-foods.html.

1 “natural.”<sup>7</sup> Meijer, a large Midwest grocery chain, introduced a brand called  
2 Meijer Naturals, which is GMO-free.<sup>8</sup>

3 ConAgra, on the other hand, has taken advantage of the increased demand  
4 by continuing to emphasize the “natural” claim on Wesson Oils while, at best,  
5 adopting a willful blindness about the extent to which that claim is misleading  
6 consumers about the nature of the Products, which are made entirely from oils  
7 containing GMOs, in contravention of its own public statements.

8 In 2007, [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]  
9 [REDACTED] [REDACTED]  
10 [REDACTED] that continued to prominently display the “100% Natural” representation  
11 on the front label, now set off in a gold bar directly below the “Wesson” brand  
12 name.<sup>9</sup> [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]

17 \_\_\_\_\_  
18 <sup>7</sup> Preserving the Earth for Future Generations, [http://www.bjs.com/bjs-](http://www.bjs.com/bjs-environmental-commitment.content.about_environmental.A.about_community2#)  
19 [environmental-commitment.content.about\\_environmental.A.about\\_community2#](http://www.bjs.com/bjs-environmental-commitment.content.about_environmental.A.about_community2#)  
(last visited May 2, 2014).

20 <sup>8</sup> Press Release, Meijer, Meijer Goes Natural with New Branded Line of  
21 Wholesome, Healthy, and Great-Tasting Grocery Items (Apr. 16, 2009), *available*  
at <http://www.meijer.com/assets/cms/pdfs/news/20090416MeijerNaturals.pdf>.

22 <sup>9</sup> See Kelston Decl., Ex. 2, CAG0001476, CAG0001486, CAG0001492,  
23 CAG0001493 (proofs of labels for one gallon Wesson vegetable, corn, and canola  
oils incorporating new design dated March 15, 2007); *see also* Kelston Decl., Ex.  
24 3, CAG0001992 [REDACTED]  
25 [REDACTED]  
26 [REDACTED]  
27 [REDACTED]  
28 [REDACTED] (emphasis in bold added).

1 [REDACTED]<sup>10</sup> [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]<sup>11</sup>  
5 In 2013, ConAgra updated its Wesson Oils labels [REDACTED]  
6 [REDACTED], moving the “100% Natural” claim from below the Wesson brand  
7 name to a spot above the brand name and combining it with the word “Pure” such  
8 that Wesson Oils all now claim that they are “Pure & 100% Natural.”<sup>12</sup> [REDACTED]  
9 [REDACTED]  
10 [REDACTED] [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]<sup>13</sup> [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]<sup>14</sup>

18 Even after this lawsuit was filed, as ConAgra sought to increase the appeal  
19 to consumers of the “natural” claim by changing its size and position and  
20 combining it with “pure” in a new claim (“Pure and 100% Natural”), which first  
21 appeared on Wesson labels in 2013, ConAgra did nothing to evaluate the “natural”  
22 claim in light of evolving science or consumer expectations to determine whether

23 <sup>10</sup> Kelston Decl., Ex. 8, CAG0000055 at CAG0000116-117.  
24

25 <sup>11</sup> *Id.* at CAG0000075.

26 <sup>12</sup> *See, e.g.*, Kelston Decl., Ex. 6, CAG0001482, CAG0001489, CAG0001500,  
27 CAG0001502 (proofs of labels for 48oz Wesson vegetable, corn, canola, and best  
blend oils dated May 9, 2013).

28 <sup>13</sup> Kelston Decl., Ex. 10, CAG0002537 at CAG0002546-2547.

<sup>14</sup> Kelston Decl., Ex. 7, CAG0001949 at CAG0001950.

1 the claim is accurate and not misleading.<sup>15</sup> In fact, Raquelle Hunter, [REDACTED]

6 [REDACTED] <sup>16</sup> [REDACTED]

8 [REDACTED] <sup>17</sup> [REDACTED]

9 [REDACTED] <sup>18</sup> [REDACTED]

10 ConAgra's motivation for placing the "100% Natural" claim on every bottle  
11 of Wesson Oils—to increase demand and thus command a higher price and sell  
12 more products—is clear. The success of ConAgra's marketing is also clear, as  
13 Wesson Oils are the leading branded cooking oils by both market share and market  
14 volume.<sup>19</sup> [REDACTED]

15  
16  
17  
18 <sup>15</sup> Kelston Decl., Ex. 4, Hunter Dep. at 67:9-14 [REDACTED]

20 <sup>16</sup> Kelston Decl., Ex. 4, Hunter Dep. at 79:24.

21 <sup>17</sup> Kelston Decl., Ex. 4, Hunter Dep. at 76:1-78:21.

22 <sup>18</sup> Kelston Decl., Ex. 5, CAG0005106 [REDACTED]

23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED] [sic]).

26  
27 <sup>19</sup> Kelston Decl., Ex. 10, CAG0002537 at CAG0002538 [REDACTED]  
28 [REDACTED]

1 [REDACTED].<sup>20</sup> As Plaintiffs allege, however, ConAgra's "100% Natural" claim, a key  
2 piece of Wesson Oils packaging, is false, unfair, deceptive, and/or misleading to  
3 consumers and damages consumers by reason of its false, unfair, deceptive, and/or  
4 misleading nature, including by the amount of the price of Wesson Oil attributable  
5 to the challenged "100% Natural" claim.<sup>21</sup>

6 **B. ConAgra's "100% Natural" Claim is False, Unfair, Deceptive,**  
7 **and/or Misleading Because Wesson Oils Are Made from**  
8 **GMOs and Are Thus Not Natural**

9 ConAgra acknowledges in documents produced in this litigation that  
10 "Wesson Oil products ... are produced with bio-engineered oil seeds."<sup>22</sup> [REDACTED]  
11 [REDACTED]

12 <sup>20</sup> See Kelston Decl., Ex. 11, CAG0001874 at CAG0001894 [REDACTED]  
13 [REDACTED]

14 [REDACTED] Kelston Decl.,  
15 Ex. 12, CAG0000355 at CAG0000366 [REDACTED]  
16 [REDACTED]

17 [REDACTED] (emphasis in original); *Id.* at CAG0000400 [REDACTED]  
18 [REDACTED] *Id.* at  
19 CAG0000413 [REDACTED]

20 <sup>21</sup> As discussed in Section IV.D.1 below, Plaintiffs have retained Colin Weir, Vice  
21 President at Economics and Technology, Inc. ("ETI"), who has offered his expert  
22 economic opinion that the total price of any product can be broken up into the  
23 separate prices of that product's various attributes, which are all set by the  
24 marketplace and can be proven using common evidence. See Declaration of Colin  
25 Weir ("Weir Decl."), ¶¶ 9-10, 14-15. Mr. Weir proposes two separate and widely  
26 accepted methods, hedonic regression and conjoint analysis, to measure the  
27 amount of Wesson Oils' retail price that corresponds to the "100% Natural" claim.  
28 *Id.* ¶¶ 12-13. Hedonic regression is "generally accepted, ha[s] been tested, and [is]  
part of peer-reviewed studies." *In re Toyota Motor Corp. Hybrid Brake Mktg.*, No.  
MDL 10-02172-CJC(RNBx), 2012 U.S. Dist. LEXIS 151559, at \*18 (C.D. Cal.  
Sept. 20, 2012). Conjoint analysis is also a widely accepted economic  
methodology. See, e.g. *Apple, Inc. v. Samsung Elecs. Co., Ltd.*, No. 12-CV-00630-  
LHK, 2014 U.S. Dist. LEXIS 24506, at \*60-76 (N.D. Cal. Feb. 25, 2014).

<sup>22</sup> Kelston Decl., Ex. 13, CAG0002222 at CAG0002243; see also Kelston Decl.,  
Ex. 14, CAG0004822 at CAG0004827 (same).

1 [REDACTED]  
2 [REDACTED].”<sup>23</sup>

3 As discussed in detail in the Declaration of Dr. Charles Benbrook  
4 (“Benbrook Decl.”), submitted in conjunction with and incorporated by reference  
5 into this Memorandum, the prevalence of genetically modified corn, soy and  
6 canola in the U.S. grain supply makes it a virtual certainty that Wesson oils are  
7 made from or contain GMOs.<sup>24</sup> According to the United States Department of  
8 Agriculture, “U.S. farmers have adopted genetically engineered (GE) crops widely  
9 since their commercial introduction in 1996, notwithstanding uncertainty about  
10 consumer acceptance and economic and environmental impacts.”<sup>25</sup> The U.S.D.A.  
11 estimates that the percentage of genetically engineered corn grown in the U.S. was  
12 25% in 2000, 73% in 2007, and 90% in 2013.<sup>26</sup> Genetically engineered soy  
13 constituted 3% of the U.S. crop in 2000, 91% in 2007, and 93% in 2013.<sup>27</sup> In  
14 2010, over 90% of canola (rapeseed) grown in Canada (the main source for U.S.  
15 food producers) was genetically modified.<sup>28</sup>

16  
17  
18 <sup>23</sup> Kelston Decl., Ex. 15, CAG0002187; *see also* Declaration of Dr. Charles  
19 Benbrook, Section IV. Plaintiffs have retained Charles Benbrook, Ph.D. to opine  
20 on the science underlying genetically modified crops and why products  
manufactured or otherwise derived from those crops are not “natural” and thus  
cannot be represented as such.

21 <sup>24</sup> Benbrook Decl., Section VIII.

22 <sup>25</sup> UNITED STATES DEPARTMENT OF AGRICULTURE, ADOPTION OF GENETICALLY  
23 ENGINEERED CROPS IN THE U.S. (2013), [http://ers.usda.gov/data-products/adoption-](http://ers.usda.gov/data-products/adoption-of-genetically-engineered-crops-in-the-us/documentation.aspx)  
of-genetically-engineered-crops-in-the-us/documentation.aspx.

24 <sup>26</sup> *See* UNITED STATES DEPARTMENT OF AGRICULTURE, GENETICALLY ENGINEERED  
25 VARIETIES OF CORN, UPLAND COTTON, AND SOYBEANS, BY STATE AND FOR THE  
UNITED STATES, 2000-13, (July 8, 2013), [http://ers.usda.gov/datafiles/](http://ers.usda.gov/datafiles/Adoption_of_Genetically_Engineered_Crops_in_the_US/alltables.xls)  
Adoption\_of\_Genetically\_Engineered\_Crops\_in\_the\_US/alltables.xls.

26  
27 <sup>27</sup> *Id.*

28 <sup>28</sup> Benbrook Decl., Section VIII.

1 Bioengineered seeds are not natural by any measure. For example,  
2 California Food and Agriculture Code Section 52300 defines a “genetically  
3 engineered plant” as a plant or plant part, “including, but not limited to, seeds and  
4 pollen, in which the genetic material has been changed through modern  
5 biotechnology in a way that does not occur naturally by multiplication or natural  
6 recombination.”<sup>29</sup> The World Health Organization explicitly defines GMOs as  
7 “organisms in which the genetic material (DNA) has been altered in a way that  
8 does not occur naturally.”<sup>30</sup>

9 The United States Environmental Protection Agency has stated that  
10 genetically engineered products like corn are designed to produce a “pesticidal  
11 protein” that does not occur naturally.<sup>31</sup> Monsanto, a leading supplier of  
12 genetically engineered seeds in the United States, defines GMOs as “[p]lants or  
13 animals that have had their genetic makeup altered to exhibit traits *that are not*  
14 *naturally theirs*. In general, genes are taken (copied) from one organism that  
15 shows a desired trait and transferred into the genetic code of another organism.”  
16 (emphasis added).<sup>32</sup>

17 Additional factual details concerning precisely how GMOs and the foods  
18 manufactured from them are not natural are contained in Dr. Charles Benbrook’s  
19 expert declaration. Dr. Benbrook also provides evidence showing that a significant

20 <sup>29</sup> CAL. FOOD & AGRIC. CODE § 52300(b) (Deering 2014). The Code also makes  
21 clear that genetic engineering is accomplished through modern technological  
22 processes that “are not techniques used in traditional breeding and selection.” *Id.* §  
23 52300(c)(2).

24 <sup>30</sup> WORLD HEALTH ORGANIZATION, 20 QUESTIONS ON GENETICALLY MODIFIED  
25 (GM) FOODS 1, *available at*  
26 [http://www.who.int/foodsafety/publications/biotech/en/20questions\\_en.pdf](http://www.who.int/foodsafety/publications/biotech/en/20questions_en.pdf) (last  
27 visited April 29, 2014).

28 <sup>31</sup> EPA’s Regulation of Biotechnology for Use in Pest Management (Jan. 2012),  
[http://www.epa.gov/opppdpd1/biopesticides/reg\\_of\\_biotech/eparegofbiotech.htm](http://www.epa.gov/opppdpd1/biopesticides/reg_of_biotech/eparegofbiotech.htm).

<sup>32</sup> Monsanto Glossary, <http://www.monsanto.com/newsviews/pages/glossary.aspx>  
(last visited April 29, 2014).

percentage of consumers are misled by “natural” claims on food packaging to believe that the products do not contain GMOs.<sup>33</sup>

**C. Plaintiffs Purchased Wesson Oils in Reliance on ConAgra’s “100% Natural” Claim**

Plaintiffs all allege that they purchased one or more Wesson Oils during the Class Period and, further, that they purchased those Products because they “believed and relied on ConAgra’s representation that [the Wesson Oils at issue] are ‘100% Natural,’” meaning GMO-free.<sup>34</sup>

**III. THE PROPOSED CLASSES**

Plaintiffs’ Complaint alleges causes of action under the statutory and common laws of the twelve states (the “Class States”) in which the named Plaintiffs reside.<sup>35</sup> Specifically, Plaintiffs assert claims or remedies under the laws of each of their states of residency for (a) false and misleading advertising, unfair competition, and/or unfair and deceptive acts and practices (generally described as Consumer Protection claims); (b) breach of express warranty; (c) breach of implied warranty; and (d) unjust enrichment. *See* Complaint, ¶¶ 64-102.

<sup>33</sup> *See* Benbrook Decl., Section III.

<sup>34</sup> *See* Second Consolidated Amended Class Action Complaint, dated Dec. 19, 2012 (Dkt. 143) (“Complaint”), ¶¶ 11, 13, 15-16, 18-19, 21, 23-29; *see also* Kelston Decl., Ex. 16 (excerpts of Plaintiffs’ Deposition Testimony).

<sup>35</sup> The Class States at issue are California, Colorado, Florida, Illinois, Indiana, Nebraska, New Jersey, New York, Ohio, Oregon, South Dakota, and Texas. Since the Complaint was filed, plaintiffs Patty Boyer, Anne Cowan, Brenda Krein, Janeth Ruiz, and Christi Toomer have been granted leave to withdraw from the litigation. *See* Order Granting Plaintiffs’ Motion for Withdrawal and Voluntary Dismissal of Individual Claims, dated May 2, 2014 (Dkt. 238). As discussed in Plaintiffs’ Motion for Withdrawal or Voluntary Dismissal of Individual Claims (Dkt. 190), the withdrawal of these plaintiffs from the litigation does not change the analysis of the state class claims because other representative plaintiffs remain active in this case from the remaining states at issue. In addition, Plaintiff Bonnie McDonald of Massachusetts is not being offered as a class representative at this time, and a motion to withdraw her from this case as a Plaintiff (should ConAgra continue to refuse to stipulate to any Plaintiff’s voluntary dismissal) is anticipated. Plaintiff Lil Marie Birr of California, although she remains a named Plaintiff, is not being proposed as a class representative at this time since two other California resident Plaintiffs—Robert Briseño and Michele Andrade—are being proposed as the California class representatives.

1 Thus, Plaintiffs propose certification of twelve separate statewide classes.<sup>36</sup>

2 Plaintiffs propose that the Court define the Classes as:

3 All persons who reside in the States of California, Colorado, Florida,  
4 Illinois, Indiana, Nebraska, New Jersey, New York, Ohio, Oregon,  
5 South Dakota, or Texas who have purchased Wesson Oils within the  
6 applicable statute of limitations periods established by the laws of  
their state of residence (the “Class Period”),<sup>37</sup> through the final  
disposition of this and any and all related actions.

7 Plaintiffs seek certification of these proposed Classes under Fed. R. Civ. P.  
8 23(b)(3) for monetary relief and under Fed. R. Civ. P. 23(b)(2) for injunctive relief.  
9 Alternatively, Plaintiffs seek certification of these proposed classes on the issue of  
10 whether ConAgra’s use of the term “100% Natural” on its Wesson Oils was false,  
11 unfair, deceptive, and/or misleading under Fed. R. Civ. P. 23(c)(4).

#### 12 **IV. ARGUMENT**

##### 13 **A. Legal Standards Governing Class Certification**

14 Class actions “permit the plaintiffs to pool claims which would be  
15 uneconomical to litigate individually” and ensure that plaintiffs have a right to  
16 redress wrongs that would otherwise “have no realistic day in court if a class action  
17 were not available.” *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809, 105 S.  
18 Ct. 2965, 86 L. Ed. 2d 628 (1985); *see also Amchem Prods. v. Windsor*, 521 U.S.  
19 591, 617, 117 S. Ct. 2231, 2246, 138 L. Ed. 2d 689, 708-09 (1997). Plaintiffs’  
20 claims here are ideally suited to satisfy the class certification standards under  
21 federal law.

22 \_\_\_\_\_  
23 <sup>36</sup> Collectively, the “Classes”, and separately, the “California Class,” “Colorado  
24 Class,” “Florida Class,” “Illinois Class,” “Indiana Class,” “Nebraska Class,” “New  
Jersey Class,” “New York Class,” “Ohio Class,” “Oregon Class,” “South Dakota  
Class,” and “Texas Class.” *See also* Complaint, ¶ 53.

25 <sup>37</sup> The state statutes of limitations for each claim alleged differ to some extent.  
26 Plaintiffs set forth the relevant statute of limitations for all the claims presently at  
27 issue in Plaintiffs’ Appendix 2 to this Memorandum. To the extent that ConAgra’s  
28 conduct is found to support a claim of equitable tolling of any the applicable  
statutes of limitations, Plaintiffs request appropriate extensions of the relevant  
limitations periods.

1 To certify a class action under Rule 23, Plaintiffs must first establish each of  
2 the following prerequisites: (1) numerosity, (2) commonality, (3) typicality, and (4)  
3 adequacy of representation. *United Steel, Paper & Forestry v. ConocoPhillips*,  
4 593 F.3d 802, 806 (9th Cir. 2010). There is also an implied requirement of  
5 ascertainability. *See In re Nucoa Real Margarine Litig.*, No. CV 10-00927, 2012  
6 U.S. Dist. LEXIS 189901, at \*18 (C.D. Cal. June 12, 2012) (Morrow, J.); *Weeks v.*  
7 *Kellogg Co.*, No. CV 09-08102, 2011 U.S. Dist. LEXIS 155472, at \*20 (C.D. Cal.  
8 Nov. 23, 2011) (Morrow, J.).

9 Once these prerequisites are met, Plaintiffs must demonstrate satisfaction of  
10 Rule 23(b)(3)'s predominance and superiority requirements to obtain monetary  
11 relief, or Rule 23(b)(2)'s general applicability requirement to obtain injunctive or  
12 declaratory relief. Class actions for monetary and injunctive relief are not  
13 exclusive to each other, and a class can be certified for both types of relief. *See*  
14 *Nw. Fruit Co. v. A. Levy & J. Zentner Co.*, 116 F.R.D. 384, 389 (E.D. Cal. 1986)  
15 (certifying a class action under Rule 23(b)(2) & (b)(3)); *Jefferson v. Ingersoll*  
16 *Intern. Inc.*, 195 F.3d 894, 898 (7th Cir. 1999) (divided certification allows courts  
17 "to certify the injunctive aspects of the suit under Rule 23(b)(2) and the damages  
18 aspects under Rule 23(b)(3), achieving both consistent treatment of class-wide  
19 equitable relief and an opportunity for each affected person to exercise control over  
20 the damages aspects").<sup>38</sup>

21 While the Court must conduct a "rigorous analysis" to ensure that the  
22 requirements of Rule 23 are satisfied, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct.  
23 2541 (2011), this analysis must be restrained because "Rule 23 grants courts no  
24 license to engage in free-ranging merits inquiries at the certification stage." *Amgen*  
25 *v. Conn. Ret. Plans & Trust*, 568 U.S. \_\_\_, 133 S. Ct. 1184, 1194-95, 185 L. Ed. 2d

26  
27 <sup>38</sup> Likewise, pursuant to Rule 23(c)(4), "[w]hen appropriate, a class may be  
28 brought or maintained as a class action with respect to particular issues." Plaintiffs  
thus alternatively move for certification of issues Classes. *See* Section IV.F.

1 308 (2013). “Merits questions may be considered to the extent—but only to the  
2 extent—that they are relevant to determining whether the Rule 23 prerequisites for  
3 class certification are satisfied.” *Id.* at 1195.

4 **B. Rule 23(a) Prerequisites**

5 **1. Numerosity**

6 Rule 23(a)(1) requires that the proposed classes be “so numerous that joinder  
7 of all members is impractical.” This standard only requires a showing that joinder  
8 of all claims would be difficult or inconvenient, not impossible. *See Evon v. Law*  
9 *Offices of Sidney Mickell*, 688 F.3d 1015, 1029 (9th Cir. 2012) (concluding  
10 numerosity was satisfied because there were 262 potential class members).

11 Here, ConAgra admits that millions of consumers purchased the relevant  
12 Wesson Oil Products during the Class Period.<sup>39</sup> It cannot be reasonably disputed  
13 that the numerosity requirement of Rule 23(a)(1) is satisfied for each of the twelve  
14 separate state classes. *See Weeks*, 2011 U.S. Dist. LEXIS 155472, at \*23  
15 (“Common sense dictates . . . that the numerosity requirement is met.”).

16 **2. Commonality**

17 Rule 23(a)(2) requires that there are questions of law or fact common within  
18 each proposed Class, and for purposes of this Rule, “even a single question will  
19 do.” *Wal-Mart Stores*, 131 S. Ct. at 2556 (internal punctuation omitted). This  
20 “common contention, moreover, must be of such a nature that it is capable of  
21 classwide resolution—which means that determination of its truth or falsity will  
22 resolve an issue that is central to the validity of each one of the claims in one  
23 stroke.” *Id.* at 2551. Furthermore, “variation among class members in their  
24 motivation for purchasing the product, the factual circumstances behind their  
25 purchase, or the price that they paid does not defeat the relatively ‘minimal’  
26 showing required to establish commonality.” *Ries v. Arizona Beverages USA LLC*,

27 \_\_\_\_\_  
28 <sup>39</sup> Answer, ¶ 57.

1 287 F.R.D. 523, 537 (N.D. Cal. 2012) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d  
2 1011, 1020 (9th Cir. 1998)).

3 In this case, there are common questions of law or fact within each proposed  
4 Class, and indeed, across all of the Classes. The first, and foremost, common  
5 question is whether ConAgra’s “100% Natural” assertion in the marketing and sale  
6 of its Wesson Oils—even though they are made from or contain GMOs—is false,  
7 unfair, deceptive, and/or misleading. This question is central to each cause of  
8 action Plaintiffs allege on behalf of each of the proposed Classes they respectively  
9 seek to represent relating to ConAgra’s violations of state consumer protection  
10 laws and breaches of its warranties to its customers.<sup>40</sup> Similarly, it is the false,  
11 unfair, deceptive, and/or misleading nature of ConAgra’s claim that Wesson Oils  
12 are “100% Natural” that makes ConAgra’s enrichment from consumer purchases  
13 of Wesson Oils unjust.<sup>41</sup>

14 Additional common questions include: (a) whether ConAgra acted  
15 knowingly or recklessly; (b) whether ConAgra’s practices violate applicable law;  
16 (c) whether Plaintiffs and the other members of the Classes are entitled to actual,  
17 statutory, or other forms of damages, and other monetary relief; and (d) whether  
18 Plaintiffs and the other members of the Classes are entitled to equitable relief,  
19 including but not limited to injunctive relief and restitution.<sup>42</sup>

### 20 3. Typicality

21 Rule 23(a)(3) requires that the claims of the proposed class representatives  
22 be typical of the claims of the other class members they seek to represent.  
23 Typicality is satisfied “when each class member’s claim arises from the same  
24 course of events, and each class member makes similar legal arguments to prove

25 <sup>40</sup> See Plaintiffs’ Appendix 1.

26 <sup>41</sup> *Id.*

27 <sup>42</sup> See Complaint, ¶ 58.

1 the defendant's liability." *Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir.  
2 2010) (quoting *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001) (citation  
3 omitted)). The typicality requirement is a "permissive standard[]" and  
4 "representative claims are 'typical' if they are reasonably co-extensive with those  
5 of absent class members; they need not be substantially identical." *Hanlon*, 150  
6 F.3d at 1020; *see also In re Northrop Grumman Corp. Erisa Litig.*, No. CV 06-  
7 06213, 2011 U.S. Dist. LEXIS 94451, at \*34 (C.D. Cal. Mar. 29, 2011) (Morrow,  
8 J.).

9 In this case, Plaintiffs allege a common pattern of wrongdoing—ConAgra's  
10 persistent and consistent claim that its Wesson Oils are "100% Natural," including  
11 through its labeling and marketing of the Products. Plaintiffs will present the same  
12 evidence (based on the same legal theories) to support their claims, as well as the  
13 other Class Members' claims. Plaintiffs were all exposed to the same allegedly  
14 false advertising on the Wesson Oils labels. *See McCrary v. Elations Co., LLC*,  
15 No. EDCV 13-00242, 2014 U.S. Dist. LEXIS 8443, at \*39 (C.D. Cal. Jan. 13,  
16 2014) ("[A] presumption of exposure is inferred where, as here, the alleged  
17 misrepresentations were on the outside of the packaging of every unit for an  
18 extended period."). Additionally, Plaintiffs have all alleged that the "100%  
19 Natural" claim was a factor in their decisions to purchase the Products.<sup>43</sup>

20  
21 <sup>43</sup> *See, e.g.,* Kelston Decl., Ex. 16, Pauline Michael Dep. (Aug. 21, 2013) at 78:8-  
22 15 ("Q. And you believe you were misled by the natural label on Wesson Oil in  
23 2007 when you last bought the oil? A. Right. Q. And why do you believe you were  
24 misled by that natural label? A. Natural to me, again, is not genetically  
25 modified."); Jill Crouch Dep. (Aug. 20, 2013) at 181:11-17 ("You testified that  
26 you stopped purchasing Wesson oil because you felt misled by the label; is that  
27 right? A. Right. Q. And what misled you about the label? A. It says it's all-natural,  
28 so it's misleading because it has GMO Canola."); Michele Andrade Dep. (Aug. 19,  
2013) at 22:6-10 ("Q. Why are you bringing this lawsuit? A. I feel that  
[ConAgra's] advertising is deceptive. Q. In what way do you believe it's  
deceptive? A. It says "100% Natural" and I don't believe that it is."); Robert  
Briseño Dep. (July 17, 2013) at 117:9-18 ("Q. Well, let's go back to the last time  
you purchased Wesson Canola Oil, the first quarter of 2011. What did the word  
'natural' mean to you at that time on a food label? A. Natural, free of  
preservatives, free of things that—GMOs, free of GMOs. Q. So 'natural' in the  
first quarter of 2011 to you meant free of preservatives and free of GMOs. Is that

1 Plaintiffs' claims are typical of all other Class Members' claims regardless  
2 of which variety (Best Blend, Corn, Canola, or Vegetable) or size (16oz, 24oz,  
3 40oz, 48oz, 64oz, one gallon, and five quart) of Wesson Oils they purchased,  
4 because all varieties and sizes of Wesson Oils were similarly labeled "100%  
5 Natural." Where misrepresentations across product lines are identical, "the  
6 dissimilarity of the accused products is relatively unimportant." *Brown v. Hain*  
7 *Celestial Grp., Inc.*, 913 F. Supp. 2d 881, 892 (N.D. Cal. 2012). Likewise, in other  
8 cases where courts have considered product type and composition, the similarity of  
9 the alleged misrepresentations holds significant weight. *See Ang v. Bimbo*  
10 *Bakeries USA, Inc.*, No. 13-cv-01196-WHO, 2014 U.S. Dist. LEXIS 34443, at  
11 \*10-29 (N.D. Cal. Mar. 13, 2014) (examining cases); *see also Astiana v. Dreyer's*  
12 *Grand Ice Cream, Inc.*, No. 11-cv-2910, 2012 U.S. Dist. LEXIS 101371, at \*37  
13 (N.D. Cal. July 20, 2012) ("That the different ice creams may ultimately have  
14 different ingredients is not dispositive as Plaintiffs are challenging the same basic  
15 mislabeling practice...."); *Anderson v. Jamba Juice Co.*, 888 F. Supp. 2d 1000,  
16 1006 (N.D. Cal. 2012) (plaintiff who purchased several flavors of at-home  
17 smoothie kits labeled "All Natural" had standing to bring claims on behalf of  
18 purchasers of other flavors because the "same alleged misrepresentation was on all  
19 of the smoothie kit[s] regardless of flavor...."); *Colucci v. ZonePerfect Nutrition*  
20 *Co.*, No. 12-cv-2907, 2012 U.S. Dist. LEXIS 183050, at \*14 (N.D. Cal. Dec. 28,  
21 2012) ("Most importantly, all twenty flavors bear the same challenged label: 'All-  
22 Natural Nutrition Bars.'"); *Wolin v. Jaguar Land Rover N. Am., L.L.C.*, 617 F.3d  
23 1168, 1175 (9th Cir. 2010) ("Typicality can be satisfied despite different factual  
24 circumstances surrounding the manifestation of the [injury].").

25  
26  
27 your testimony? A. Yes."); *see also Kelston Decl.*, Ex. 16 *passim* (excerpts of the  
28 relevant depositions).

1                                   **4. Adequacy of Representation**

2           Rule 23(a)(4) requires that the class representative “fairly and adequately  
3 protect the interests of the class.” This requirement entails answering two  
4 questions: “(1) Do the representative plaintiffs and their counsel have any  
5 conflicts of interest with other class members, and (2) will the representative  
6 plaintiffs and their counsel prosecute the action vigorously on behalf of the class?”  
7 *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003) (citation omitted).  
8 Plaintiffs easily meet both of these prerequisites.

9           First, Plaintiffs’ interests do not, in any way, conflict with the other Class  
10 Members’ interests. Indeed, there is nothing to suggest that any of the Plaintiffs  
11 have any interests antagonistic to their vigorous pursuit of the Classes’ claims.  
12 Furthermore, each Class Member’s claims arise under the same legal theories and  
13 each Class Member was harmed in the same way as Plaintiffs, so that the  
14 Plaintiffs’ interests align with the interests of the absent members of the Classes  
15 they seek to represent. Plaintiffs have also demonstrated their adequacy through  
16 their participation in this litigation, including by providing or agreeing to provide  
17 deposition testimony in this case.<sup>44</sup>

18           Second, Plaintiffs have retained highly experienced counsel with significant  
19 experience in litigating class actions. *See Marilley v. Bonham*, No. C-11-02418-  
20 DMR, 2012 U.S. Dist. LEXIS 33678, at \*23-24 (N.D. Cal. Mar. 13, 2012) (“In  
21 determining adequacy of proposed class counsel, a court must consider ‘(i) the  
22 work counsel has done in identifying or investigating potential claims in the action;  
23 (ii) counsel's experience in handling class actions, other complex litigation, and the  
24 types of claims asserted in the action; (iii) counsel's knowledge of the applicable  
25 law; and (iv) the resources that counsel will commit to representing the class.’”  
26 (quoting Fed. R. Civ. P. 23(g)(1)(A))). Plaintiffs’ law firms, including, in

27  
28 <sup>44</sup> *See, e.g.*, Kelston Decl., Ex. 16 *passim* (excerpts of the relevant depositions).

1 particular, Interim Co-Lead Counsel, have been at the forefront of class action  
2 litigation.<sup>45</sup> The combined experience of Proposed Class Counsel and their firms  
3 in class action litigation and consumer advocacy is more than sufficient for them to  
4 act on behalf of the Classes.

5 **C. Ascertainability**

6 Although not mentioned in Rule 23, courts have often imputed a judicially-  
7 created “ascertainability” requirement into the class certification analysis. *In re*  
8 *Nucoa Real Margarine Litig.*, 2012 U.S. Dist. LEXIS 189901, at \*17. This  
9 requirement is satisfied if the characteristics of the members of the classes are  
10 adequately defined and can be identified by reference to objective criteria. *Id.* In  
11 this case, there is a single objective criterion that determines whether any particular  
12 individual is a member of the class: whether they purchased Wesson Oils during  
13 the Class Period. *See McCrary*, 2014 U.S. Dist. LEXIS 8443, at \*25 (certifying  
14 consumer class action because “the class definition clearly defines the  
15 characteristics of a class member by providing a description of the allegedly  
16 offending product and the eligible dates of purchase”).

17 It is irrelevant whether these Class Members can be specifically identified  
18 prior to class certification. *See Ries*, 287 F.R.D. at 535 (holding ascertainability  
19 requirement was satisfied because “[t]here is no requirement that ‘the identity of  
20 the class members . . . be known at the time of certification’”) (citation omitted);  
21 *Zeisel v. Diamond Foods, Inc.*, No. C 10-1192, 2011 U.S. Dist. LEXIS 60608, at  
22 \*20-21 (N.D. Cal. June 7, 2011) (rejecting argument that class of consumers who  
23 purchased misleading walnut products was “not administratively feasible” because  
24 the class “includes objective characteristics that would permit a consumer to  
25 identify themselves [sic]”); *Chavez v. Blue Sky Nat. Bev. Co.*, 268 F.R.D. 365, 377  
26 (N.D. Cal. 2010) (concluding that class of persons was ascertainable if they

27  
28 <sup>45</sup> See Kelston Decl., Ex. 17 (firm resumes of Plaintiffs’ Interim Co-Lead Counsel).

1 purchased beverages bearing disputed mark or brand); *In re Nucoa Real Margarine*  
2 *Litig.*, 2012 U.S. Dist. LEXIS 189901, at \*18 (“Here, although class members may  
3 have difficulty establishing that they are purchasers of [defendant’s product], the  
4 class definition itself is clearly defined. As a result, the ascertainability  
5 requirement is met.”).

6 Recently, Central District of California Chief Judge King issued an opinion  
7 granting certification over a defendant’s ascertainability challenge because the  
8 plaintiffs “precisely defined their class based on an objective criteria: purchase of  
9 Defendants’ children’s cold or flu products within a prescribed time frame. This is  
10 enough to satisfy Rule 23(a)’s implied ascertainability requirement.” *Forcellati v.*  
11 *Hyland’s, Inc.*, No. CV 12-1983-GHK (MRWx), 2014 U.S. Dist. LEXIS 50600, at  
12 \*13 (C.D. Cal. Apr. 9, 2014) (citations omitted). Similarly, the court in *Ebin v.*  
13 *Kangadis Food*, No. 13 Civ. 2311, 2014 U.S. Dist. LEXIS 25838, at \*15 (S.D.N.Y.  
14 Feb. 24, 2014), certified a consumer class action against a company that  
15 deceptively labeled products as being “100% Pure Olive Oil” when they were not,  
16 and noted that individually identifying purchasers “should not be made into a  
17 device for defeating the action.” The Class definition proposed here—individuals  
18 from specified states who purchased Wesson Oils during specified time periods—  
19 thus comports with ascertainability jurisprudence in this Circuit.<sup>46</sup>

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21  
22  
23 <sup>46</sup> ConAgra likely will seek to rely on the Third Circuit’s decision in *Carrera v.*  
24 *Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013). *Bayer*, however, is not controlling  
25 precedent here, and runs counter to the law in the Ninth Circuit, which bases  
26 ascertainability on the presence of “objective criterion” rather than, as the *Bayer*  
27 court held, the ability to identify every individual member of the proposed class  
28 with near-perfect accuracy. See *McCrary*, 2014 U.S. Dist. LEXIS 8443, at \*24  
 (“While [*Bayer*] may now be the law in the Third Circuit, it is not currently the law  
 in the Ninth Circuit.”); see also *Lanovaz v. Twinings N. Am., Inc.*, No. C-12-  
 02646-RMW, 2014 U.S. Dist. LEXIS 57535, at \*7-9 (N.D. Cal. Apr. 24, 2014)  
 (collecting cases).

**D. Rule 23(b)(3)—Predominance and Superiority**

To certify a class under Rule 23(b)(3), Plaintiffs must establish that common questions predominate over questions affecting individual plaintiffs and that a class action is superior to other means of adjudicating the case. Fed. R. Civ. P. 23(b)(3). Rule 23(b)(3) specifies several “matters pertinent to these findings,” and, as discussed below, Plaintiffs and the other members of the proposed Classes here satisfy each of these Rule 23(b)(3) standards.

**1. Predominance**

Under Rule 23(b)(3), Plaintiffs must establish that “questions of law or fact common to class members predominate over any questions affecting only individual members.” *Amgen Inc.*, 133 S. Ct. at 1191. “Rule 23(b)(3), however, does *not* require a plaintiff seeking class certification to prove that each ‘elemen[t] of [her] claim [is] susceptible to classwide proof.’” *Id.* at 1196 (citation omitted) (emphasis in original). In part for this reason, “predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws.” *Amchem Prods.*, 521 U.S. at 625. In this case, common questions predominate because the answers to them will drive the resolution of this litigation.<sup>47</sup>

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<sup>47</sup> See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. at 2551 (“What matters . . . is not the raising of common questions—even in droves—but, rather the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation.”) (emphasis and internal quotation marks omitted); see also *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 859 (6th Cir. 2013) (“Whirlpool does not point to any ‘fatal dissimilarity’ among the members of the certified class that would render the class action mechanism unfair or inefficient for decision-making. Instead, Whirlpool points to ‘a fatal similarity—[an alleged] failure of proof as to an element of the plaintiffs’ cause of action.’ That contention, the Supreme Court instructs, ‘is properly addressed at trial or in a ruling on a summary-judgment motion. The allegation should not be resolved in deciding whether to certify a proposed class.’ Tracking the Supreme Court’s reasoning, we conclude here that common questions predominate over any individual ones. Simply put, this case comports with the ‘focus of the predominance inquiry’—it is ‘sufficiently cohesive to warrant adjudication by representation.’”) (internal citations omitted).

1 The critical question that will drive the resolution of this litigation is whether  
2 ConAgra's "100% Natural" claim in connection with the marketing and sale of  
3 Wesson Oils—all of which were made from or contain GMOs—is false, unfair,  
4 deceptive, and/or misleading. *Cf. Butler v. Sears, Roebuck & Co.*, 727 F.3d 796,  
5 801-02 (7th Cir. 2013) ("There is a single, central, common issue of liability:  
6 whether the Sears washing machine was defective. Two separate defects are  
7 alleged, but remember that this class action is really two class actions. In one the  
8 defect alleged involves mold, in the other the control unit. Each defect is central to  
9 liability."). Here, it is inarguable that ConAgra made its "100% Natural"  
10 representation on the front of every label of the Wesson Oil Products in question in  
11 this litigation, and, further, that ConAgra *admits* that its Wesson Oils are made  
12 from bioengineered seeds.<sup>48</sup> Moreover, the evidence necessary to demonstrate the  
13 materiality of ConAgra's "100% Natural" misrepresentation and Class Members'  
14 reliance on the misrepresentation (in the states where such a showing is required) is  
15 also common to all members of the various Classes.

16 While ConAgra now asserts in defense to this litigation that describing a  
17 product as "100% Natural" is not a claim about the GMO characteristics of that  
18 product's ingredients, [REDACTED]

19 [REDACTED]

20 [REDACTED]

21

22 <sup>48</sup> See above, Section II & nn.2, 20-21; see also Hunter Dep., at 113:15-114:17  
23 ("Q. Is Wesson vegetable oil made from plants that have been genetically  
24 modified using biotechnology? A. Wesson vegetable oil is made from soybeans  
25 that are available on the open market. Q. And the majority—and I believe you  
26 said the majority of those soybeans are from genetically modified plants, is that  
27 correct? A. That is my understanding. Q. Is it fair then to conclude that Wesson  
28 vegetable oil is made from crops that were genetically modified using  
biotechnology? A. It's fair to conclude that Wesson does have some—that  
Wesson vegetable oil is made from some soybeans that have used genetically  
modified seeds. I don't know that all of it is, but it's fair to say there is some  
portion. Q. Okay. And is that true also of Wesson corn oil? A. Yes, I believe  
that would apply as well.")

1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED] ConAgra nonetheless chose to  
8 prominently label its Wesson Oils throughout the Class Period as being “100%  
9 Natural,” despite the fact that it continued to use genetically altered ingredients to  
10 make those oils and also despite the fact that ConAgra was well aware that labeling  
11 those Products as “natural” was inconsistent (*i.e.*, false, unfair, deceptive, and/or  
12 misleading) with the truth.

13 Plaintiffs will also be able to show that ConAgra’s “100% Natural” claim is  
14 material to the “reasonable consumer” and not mere puffery, even though this  
15 showing is not required at this stage. *See McCrary*, 2014 U.S. Dist. LEXIS 8443,  
16 at \*42 (“[A]t the class certification stage Plaintiff need not prove that the  
17 [defendant’s misrepresentations] were material to all consumers of [the product] or  
18 that they relied on those claims.”); *Chavez*, 268 F.R.D. at 376 (“[R]eliance on the  
19 alleged misrepresentations may be inferred as to the entire class if the named  
20 plaintiff can show that material misrepresentations were made to the class  
21 members.”); *In re Nucoa Real Margarine Litig.*, 2012 U.S. Dist. LEXIS 189901, at  
22 \*30 (“Here, it is clear that common questions of fact and law predominate over  
23 issues individual to class members. This is so because the test is not each  
24 consumer’s individual reliance on defendant’s representations. Rather, the  
25  
26  
27

28 <sup>49</sup> Kelston Decl., Ex. 18, CAG00003536 at 3538-39 (emphasis added).

1 pertinent inquiry is whether a reasonable consumer would likely have been  
2 deceived by the representations.”).<sup>50</sup>

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]<sup>51</sup> [REDACTED]

6 [REDACTED]

7 [REDACTED]<sup>52</sup> [REDACTED]

8 [REDACTED]

9 [REDACTED]<sup>53</sup> [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]<sup>54</sup> Regardless of whether consumers think GM foods are good or  
13 bad, ConAgra knows that consumers want to be presented with fair information on  
14 product labels so that they can make these decisions for themselves without being  
15 misled by a product claiming to be “100% Natural” when it is not.<sup>55</sup>

16 <sup>50</sup> See *Amgen Inc.*, 133 S. Ct. at 1191 (regarding materiality of allegedly false  
17 representations in proposed class action, “Rule 23(b)(3) requires a showing  
18 that *questions* common to the class predominate, not that those questions will be  
19 answered, on the merits, in favor of the class. Because materiality is judged  
20 according to an objective standard, the materiality of [defendant’s] alleged  
21 misrepresentations and omissions is a question common to all members of the class  
22 [plaintiffs] would represent. . . . As to materiality, therefore, the class is entirely  
23 cohesive: It will prevail or fail in unison. In no event will the individual  
24 circumstances of particular class members bear on the inquiry.”).

21 <sup>51</sup> See Kelston Decl., Ex. 8, CAG0000055 at CAG0000116.

22 <sup>52</sup> See Kelston Decl., Ex. 10, CAG0002537 at CAG0002547.

23 <sup>53</sup> See Benbrook Decl., Section III, “Consumer Expectations Triggered by  
24 ‘Natural’ Label Claims” citing, among other references, Hartman Group (2010),  
25 “Beyond Natural and Organic.”

26 <sup>54</sup> Kelston Decl., Ex. 20, CAG0002144 at CAG0002154.

27 <sup>55</sup> See Kelston Decl., Ex. 21, CAG002319 at CAG002319 [REDACTED]

28 [REDACTED]

[REDACTED] see also Kelston Decl., Ex. 22, Claire Marris, *Public*

1 ConAgra is well aware that whether its foods, including its Wesson Oils,  
2 contain GMOs is an important consumer purchasing criterion—a fact further  
3 confirmed by its recent expenditure of millions of dollars opposing GMO labeling  
4 initiatives in, among other places, California and Washington.<sup>56</sup> [REDACTED]

5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED].<sup>57</sup>

8 On April 23, 2014, Vermont became the first state in the U.S. to require the  
9 labeling of GMO foods and similar labeling efforts are reported to be underway in  
10 approximately twenty other states.<sup>58</sup>

11 That the actual claims and remedies permitted may differ among the separate  
12 Classes in no way defeats predominance. *See Hanlon*, 150 F.3d at 1022 (“In this  
13 case, although some class members may possess slightly differing remedies based  
14 on state statute or common law, the actions asserted by the class representatives are  
15 not sufficiently anomalous to deny class certification. On the contrary, to the

16  
17 *Views on GMOs: Deconstructing the Myths*, 2 EMBO REP. 545 (2001) (study  
18 confirming supposed myth that “people are obsessed with the idea that GMOs are  
19 ‘unnatural’” finding “GMOs were indeed frequently characterised [*sic*] as  
‘unnatural’ by focus group participants. They expressed the feeling that directly  
modifying the genome was qualitatively different from any previously used  
technique.”).

20 <sup>56</sup> ConAgra contributed more than \$285,000 in 2013 to defeat Washington  
21 Initiative 522, which would have required labeling of GMO foods and donated in  
22 excess of \$1 million in 2012 to oppose California’s Proposition 37 GMO labeling  
23 law. *See* Joel Connelly, *Pepsi, Coke, Nestle Top Multi-Million-Dollar Campaign*  
24 *Against I-522*, SEATTLEPI.COM, Oct. 18, 2013, available at:  
25 [http://blog.seattlepi.com/seattlepolitics/2013/10/18/pepsi-coke-nestle-top-multi-](http://blog.seattlepi.com/seattlepolitics/2013/10/18/pepsi-coke-nestle-top-multi-million-dollar-campaign-against-i-522/)  
26 [million-dollar-campaign-against-i-522/](http://blog.seattlepi.com/seattlepolitics/2013/10/18/pepsi-coke-nestle-top-multi-million-dollar-campaign-against-i-522/); Daniel Willis & Leigh Poitinger,  
27 *Proposition 37 Donor and Finance Information*, MERCURYNEWS.COM, Aug. 24,  
28 2014, [http://www.mercurynews.com/elections/ci\\_21386000?appSession=](http://www.mercurynews.com/elections/ci_21386000?appSession=86160328214226)  
86160328214226.

26 <sup>57</sup> Kelston Decl., Ex. 20, CAG002144 at CAG002166.

27 <sup>58</sup> Stephanie Strom, *Vermont Will Require Labeling of Genetically Altered Foods*,  
28 N.Y. TIMES, April 24, 2014, available at  
[http://www.nytimes.com/2014/04/24/business/vermont-will-require-labeling-of-](http://www.nytimes.com/2014/04/24/business/vermont-will-require-labeling-of-genetically-altered-foods.html)  
genetically-altered-foods.html.

1 extent distinct remedies exist, they are local variants of a generally homogenous  
2 collection of causes which include products liability, breaches of express and  
3 implied warranties, and ‘lemon laws.’”); *Sullivan v. DB Inv., Inc.*, 667 F.3d 273,  
4 301 (3rd Cir. 2011) (en banc) (holding commonality and predominance are not  
5 “defeated merely because available rights and remedies differ under the several  
6 laws that form the basis for the class claims. We have never required the  
7 presentation of identical or uniform issues or claims as a prerequisite to  
8 certification of a class.”) (footnote omitted).

9 Recognizing, based on the foregoing, that Plaintiffs have alleged a  
10 predominant common issue, ConAgra will no doubt argue that proof of damages  
11 will vary so much that predominance cannot be satisfied. ConAgra’s arguments  
12 would be incorrect, however, because a number of different options exist for  
13 measuring damages from common evidence, since the price of a bottle of Wesson  
14 Oil is not individually negotiated by consumers when they purchase Wesson Oils  
15 at retail.<sup>59</sup> Thus, the measure of economic impact on the retail price of Wesson  
16 Oils caused by ConAgra’s allegedly false, unfair, deceptive, and/or misleading  
17 labeling of those Products is also a predominant common question to all members  
18 of the Classes, that will be answered with common, as opposed to individualized,  
19 proof.<sup>60</sup>

20 The measure of each Class Member’s damages is the amount of “price  
21 premium” inherent in each bottle of Wesson Oils that Class Members purchased  
22 that corresponds to ConAgra’s “100% Natural” marketing claim, which Plaintiffs  
23 allege is not actually provided by the Product because Wesson Oils are made from  
24

25

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26 <sup>59</sup> See Weir Decl., ¶ 10.  
27

28 <sup>60</sup> See Weir Decl., ¶¶ 14, 24, 33-35, 36, 46-48.

1 GMOs.<sup>61</sup> As Plaintiffs’ economic expert Colin Weir opines, consumers are unable  
2 to individually negotiate the price they paid to purchase Wesson Oils from retailers  
3 that is attributable to the “100% Natural” claim—all consumers pay the same  
4 amount for the attribute because regardless of how they value the attribute, the  
5 price of Wesson Oils is determined collectively in the marketplace, and not by any  
6 one individual Class Member.<sup>62</sup>

7 Even though retail prices of Wesson Oils varied during the course of the  
8 Class Period, certification of a damages class is still appropriate because  
9 calculating a “price premium” that corresponds to a particular product attribute is  
10 easily accomplished by applying economic principles to common, class-wide  
11 evidence. *See Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 515 (9th Cir. 2013)  
12 (holding district court abused its discretion in denying class certification based on  
13 the need to individually calculate damages); *see also Guido v. L’Oreal, USA, Inc.*,  
14 284 F.R.D. at 479 (certifying class action because plaintiffs are permitted “to seek  
15 recovery of a ‘price premium,’ regardless of whether plaintiffs were able to  
16 quantify the premium that was paid or identify other products sold at a lower price

17 \_\_\_\_\_  
18 <sup>61</sup> The term “Price Premium” is used here to indicate the additional amount that  
19 consumers paid for Wesson Oils as a direct result of the 100% Natural Claim, not  
the overall premium that Wesson Oils may command in the marketplace vis-à-vis  
competitor products. *See Weir Decl.*, n.5.

20 <sup>62</sup> *Weir Decl.*, ¶ 10. Plaintiffs’ provision of expert testimony plainly distinguishes  
21 the instant case from *Caldera v. J.M. Smucker Co.*, in which Judge King denied  
22 class certification in a situation in which plaintiffs failed to provide any expert  
23 testimony on damages. *See Caldera v. J.M. Smucker Co.*, Case No. CV 12-4936-  
24 GHK (VBKx), 2014 U.S. Dist. LEXIS 53912 at \*11 (C.D. Cal. Apr. 15, 2014)  
25 (“This is not to say that damages can never be determined on a classwide basis  
26 under California’s consumer protection statutes. In many cases, restitution may be  
27 proven on a classwide basis by computing the effect of unlawful conduct on the  
28 market price of the product purchased by the class. This measure of restitution,  
however, requires the plaintiff to produce evidence that ‘attaches a dollar value to  
the “consumer impact or advantage” [to defendant] caused by the unlawful  
business practices.’ ‘Expert testimony may be necessary to determine the amount  
of price inflation attributable to the challenged practice.’ Here, Plaintiff has failed  
to offer any evidence, let alone expert testimony, that damages can be calculated  
based on the difference between the market price and true value of the products.”)  
(internal citations omitted).

1 that [were properly labeled]”). Economic analysis using the well-accepted  
2 methods of hedonic regression and/or conjoint analysis is thus capable of  
3 measuring the value of the “100% Natural” marketing attribute as a part of the total  
4 retail price of Wesson Oils—the calculation of the premium that corresponds to the  
5 attribute is independent of the actual retail price any one particular consumer paid  
6 for Wesson Oils over time.<sup>63</sup> Indeed, survey evidence indicates that consumers are  
7 willing to pay a premium price for natural products.<sup>64</sup>

8         Demonstrating the existence of a viable damages model that makes use of  
9 common, class-wide evidence is all that is required at the class certification stage.  
10 *See McCrary*, 2014 U.S. Dist. LEXIS 8443, at \*49-50 (certifying consumer class  
11 because plaintiff presented a viable damages model and “it is not necessary to  
12 show that his method will work with certainty at this time”) (quoting *Chavez*, 268  
13 F.R.D. at 379 (certifying consumer class because plaintiffs were able to  
14 demonstrate one potential measure of damages based on the premium price paid by  
15 consumers)); *see also Zeisel*, 2011 U.S. Dist. LEXIS 60608, at \*32 (accepting  
16 plaintiff’s assertion for class certification purposes that “he will be able to prove  
17 the proper amount of restitution by relying on documents produced by [defendant]  
18 relating to net sales, profits, and costs, as well as retail prices of” the products at  
19 issue); *cf. Hinojos v. Kohl’s Corp.*, 718 F.3d 1098, 1102 (9th Cir. 2013) (holding  
20 consumers have lost money or property if false advertising induces them to buy  
21 products they would not have purchased or to spend more than they would have  
22 otherwise spent); *Degelmann v. Advanced Med. Optics, Inc.*, 659 F.3d 835, 840  
23 (9th Cir. 2011) (holding plaintiffs suffered damages because “[h]ad the product  
24  
25

26 <sup>63</sup> *See Weir Decl.*, ¶¶ 31, 45, 49-51

27 <sup>64</sup> *See Kelston Decl.*, Ex. 23, LEATHERHEAD FOOD RESEARCH, DO ‘NATURAL’  
28 CLAIMS CUT THE MUSTARD? (2013).

1 been labeled accurately, they would not have been willing to pay as much for it as  
2 they did, or would have refused to purchase the product altogether”).

3 In this case, as demonstrated through and explained in detail in the Colin  
4 Weir’s expert report, the economic techniques of hedonic regression and/or  
5 conjoint analysis are both appropriate tools for calculating the value that may be  
6 assigned to a product attribute (and thus the amount by which Class Members are  
7 damaged when the promised attribute is not actually provided). Moreover, such  
8 techniques “do not require any individual inquiry, and can produce Class-wide  
9 results using common evidence.”<sup>65</sup>

10 Furthermore, Plaintiffs’ damages theories are properly linked to Plaintiffs’  
11 theory of harm—that is, they specifically measure the amount by which consumers  
12 overpaid for a product attribute, here, ConAgra’s claim that Wesson Oils are  
13 “100% Natural,” that was not actually provided—in satisfaction of the Supreme  
14 Court’s *Comcast* decision. *See Comcast v. Behrend*, 133 S. Ct. 1426, 1433 (2013)  
15 (“a model purporting to serve as evidence of damages in this class action must  
16 measure only those damages attributable to that theory”); *Butler*, 727 F.3d at 799  
17 (“Comcast holds that a damages suit cannot be certified to proceed as a class action  
18 unless the damages sought are the result of the class-wide injury that the suit  
19 alleges” and noting that “[i]t follows that a model purporting to serve as evidence  
20 of damages in this class action must measure only those damages attributable to  
21 that theory.”).

22 Accordingly, common questions predominate over individualized questions  
23 in establishing ConAgra’s liability under all of the claims Plaintiffs allege on  
24 behalf of all of the Classes, because all claims depend on the false, unfair,  
25 deceptive, and/or misleading nature of ConAgra’s claim that Wesson Oils are  
26

27  
28 <sup>65</sup> *See Weir Decl.*, ¶ 14.

1 “100% Natural,” as well as the measure of damages arising therefrom, thus  
2 satisfying Rule 23(b)(3)’s predominance requirement.<sup>66</sup>

## 3                   **2. Superiority**

4           Rule 23(b)(3)’s superiority requirement tests whether “classwide litigation  
5 of common issues will reduce litigation costs and promote greater efficiency.”  
6 *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996). Here,  
7 classwide litigation over whether labeling a product made from GMOs as “100%  
8 Natural” is false, unfair, deceptive, and/or misleading to consumers, and over the  
9 measure of economic impact such labeling had on the price those consumers paid  
10 for Wesson Oils, is far more efficient than millions of individual trials by millions  
11 of different consumers in different forums over a relatively low-cost consumer  
12 food product.

13           Where, as here, the damages suffered by each proposed Class Member are  
14 not large, a class proceeding is favored. *See Astiana v. Kashi Co.*, 291 F.R.D. 493,  
15 507 (S.D. Cal. 2013) (“Where a case involves multiple claims for relatively small  
16 individual sums, some plaintiffs may not be able to proceed as individuals because  
17 of the disparity between their litigation costs and what they hope to recover.”).<sup>67</sup> It  
18 is more efficient to resolve the common and predominant question of whether  
19 ConAgra’s claim that its Wesson Oils are “100% Natural” is a false, unfair,  
20 deceptive, and/or misleading claim (an essential question for all of the consumer  
21 protection, breach of warranty, and unjust enrichment claims at issue in this case)

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23 <sup>66</sup> Should the Court conclude that the predominance requirement of Rule 23(b)(3)  
24 is not satisfied due to issues related to damages, Plaintiffs alternatively seek  
certification under Rule 23(c)(4), as discussed in Section IV.F. (below).

25 <sup>67</sup> *See also Amchem Prods.*, 521 U.S. at 615 (noting the superiority requirement  
26 was added to the Federal Rules by the Advisory Committee “to cover cases ‘in  
27 which a class action would achieve economies of time, effort, and expense, and  
28 promote . . . uniformity of decision as to persons similarly situated, without  
sacrificing procedural fairness or bringing about other undesirable results’”) (citation omitted).

1 in a single proceeding rather than to have individual courts separately adjudicate  
2 this issue—a point this Court confirmed in *In re Nucoa Real Margarine Litig.*,  
3 2012 U.S. Dist. LEXIS 189901, at \*33 (“In a consumer class action of this type  
4 involving the purchase of a relatively inexpensive food product, injured consumers  
5 are extremely unlikely to pursue their claims on an individual basis.”); *see also*  
6 *Johns v. Bayer Corp.*, 280 F.R.D. 551, 559 (S.D. Cal. 2012). Plaintiffs are  
7 unaware of any other cases challenging ConAgra’s “100% Natural” claim on its  
8 Wesson Oils under any state’s law, and the JPML already determined that it was  
9 more efficient for any such cases to be transferred to this Court for coordinated or  
10 consolidated pretrial proceedings, confirming the efficiency of the class vehicle in  
11 this context.<sup>68</sup> And there is no evidence that this consumer class action will be  
12 difficult to manage, because the questions at issue concerning liability and  
13 damages are all objective questions determinable from common, class-wide  
14 evidence.

15 Additionally, Plaintiffs are not seeking certification of a nationwide class at  
16 this time. Rather, they seek certification of separate statewide classes based on  
17 common facts and their own individual state laws regarding (a) consumer  
18 protection; (b) breach of express warranty; (c) breach of implied warranty; and/or  
19 (d) unjust enrichment. This framework significantly simplifies any questions  
20 regarding manageability regardless of variations in state law because no choice of  
21 law analysis is necessary as each of the separate statewide Classes only seeks to  
22 apply the law of their states of residence to the claims of the separate Classes.<sup>69</sup>

23  
24 <sup>68</sup> *See In re Wesson Oil Mktg. & Sales Practices Litig.*, 818 F. Supp. 2d 1383  
25 (J.P.M.L. 2011).

26 <sup>69</sup> Because Plaintiffs only seek relief under the laws of their own states of  
27 residence, this Court does not need to determine “whether the relevant law of each  
28 of the potentially affected jurisdictions with regard to the particular issue in  
question is the same or different.” *Mazza v. Am. Honda*, 666 F.3d 581, 590 (9th  
Cir. 2012) (citation omitted).

1 Finally, it is likely no other realistic opportunity exists for adjudicating this  
2 controversy.<sup>70</sup> Thus, the Rule 23(b)(3) superiority requirement is met here.

3 **E. Rule 23(b)(2)—Injunctive and Declaratory Relief**

4 In addition to seeking certification of damages Classes under Rule 23(b)(3),  
5 Plaintiffs also seek certification under Rule 23(b)(2) for declaratory and injunctive  
6 relief. “[I]n an appropriate case, a Rule 23(b)(2) class and a Rule 23(b)(3) class  
7 may be certified where there is a real basis for both damages and an equitable  
8 remedy.” *See Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 538 n.37 (N.D.  
9 Cal. 2012) (certifying claims under both (b)(2) and (b)(3)) (quoting *Kartman v.*  
10 *State Farm Mut. Auto. Ins. Co.*, 634 F.3d 883, 895 (7th Cir. 2011) (citations  
11 omitted)).

12 In this case, the Classes meet the Rule 23(b)(2) certification requirements  
13 because ConAgra’s deceptive marketing of its “100% Natural” Products is a matter  
14 of general applicability to all Class Members “so that final injunctive relief or  
15 corresponding declaratory relief is appropriate respecting the class[es] as a whole.”  
16 Rule 23(b)(2); *see also Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010)  
17 (“The fact that some class members may have suffered no injury or different  
18 injuries from the challenged practice does not prevent the class from meeting the  
19 requirements of Rule 23(b)(2).”).

20 The Supreme Court has clarified that “[t]he key to the (b)(2) class is ‘the  
21 indivisible nature of the injunctive or declaratory remedy warranted—the notion  
22 that the conduct is such that it can be enjoined or declared unlawful only as to all  
23 of the class members or as to none of them.’” *Wal-Mart Stores, Inc.*, 131 S. Ct. at  
24 2557 (citation omitted). “In other words, Rule 23(b)(2) applies only when a single

25 <sup>70</sup> *See Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (“the  
26 more claimants there are, the more likely a class action is to yield substantial  
27 economies in litigation. It would hardly be an improvement to have in lieu of this  
28 single class 17 million suits each seeking damages of \$15 to \$30. . . . The realistic  
alternative to a class action is not 17 million individual suits, but zero individual  
suits, as only a lunatic or a fanatic sues for \$30.”).

injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant.” *Id.*

Here, Plaintiffs seek declaratory and injunctive relief that enjoins ConAgra from continuing to market its Wesson Oils as being “100% Natural” as long as those oils contain GMO ingredients. (Complaint, Request for Relief, ¶ D.) This type of relief generally applies to all Class Members, because ConAgra does not customize the labels on Wesson Oils for each individual consumer, and an injunction barring ConAgra from continuing to label Wesson Oils as being “100% Natural” is appropriate relief for the Classes as a whole. As such, the Classes for declaratory and injunctive relief meet the Rule 23(b)(2) requirements.

**F. Alternatively This Court May Employ Rule 23(c)(4) to Certify a Class on Designated Issues**

In the event this Court holds that any particular class claim fails to satisfy the requirements of Rule 23(b), Plaintiffs alternatively move for certification of relevant issues classes under Rule 23(c)(4). Consumer false advertising cases based on false labels are suitable for full certification under Rules 23(b)(2) and 23(b)(3), but Rule 23(c)(4) can be used to certify issue classes to resolve predominating disputed issues common to all class members.<sup>71</sup> Here, the question

<sup>71</sup> Fed. R. Civ. P. 23(c)(4) (“When appropriate, (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.”); *see also Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) (“Rule 23 authorizes the district court in appropriate cases to isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of these particular issues.”); *Ellis*, 285 F.R.D. at 544 (“[E]ven if individualized issues were to predominate with respect to Plaintiffs’ monetary relief claims, the Court would utilize the mechanism under Rule 23(c)(4) to adjudicate those issues capable of classwide resolution separately.”); *see also* 7A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1790 (3d ed. 2005) (stating that subsection (c)(4) “may be used to designate appropriate classes or class issues at the certification stage” so that “the court can determine whether, as so designated, the other Rule 23 requirements are satisfied”).

1 of whether ConAgra has misled consumers by labeling Wesson Oils as being  
2 “100% Natural” when, in fact, they are made from GMOs is a question involving a  
3 single manufacturer and a uniform representation, placed prominently on the front  
4 of all Wesson Oil labels sold throughout the Class Period. This simple question  
5 fits squarely within the bounds of warranting Rule 23(c)(4) certification.

6 **V. CONCLUSION**

7 For all of the foregoing reasons, Plaintiffs respectfully request that the Court  
8 grant Plaintiffs’ motion for class certification in the form of the proposed Order  
9 proffered contemporaneously herewith.

10  
11 DATED: May 5, 2014

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